IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/06/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL No.1455 of 1999 and SECOND APPEAL No. 1456 of 1999

Chinnapillai @ Perumal. ...Appellant in
both appeals
-Vs-

Peruma. ...Respondent in
S.A.No.1455 of 1999

1.Peruma.
2.Kaliappan.
...Respondents in
S.A.No.1456 of 1999

Second Appeals preferred under Section 100 C.P.C., praying for
the reliefs as stated therein.

For Appellant in both appeals : Mr.K.Muralidharan
for Mr.C.R. Muralidharan
both appeals.

For Respondents in : Mr.V.Nicholas.
both S.As.

:J U D G M E N T

Second Appeal No.1455 of 1999 is preferred against the judgment and decree dated 31.3.1999 made in A.S.No.88 of 1998 by the Court of III Additional District Judge, Dharmapuri at Krishnagiri, thereby allowing the appeal without costs, setting aside the judgment and decree dated 31.7.1988 in O.S.No.142 of 1990 by the Court of District Munsif, Krishnagiri and decreeing the suit for declaration of the plaintiff's easementary right to take water from K.R.P Dam east-west water channel through the defendant's land to her land and mandatory injunction directing the defendant to form a channel from K.R.P dam east west channel through the defendant's land. It was further ordered that as and when the Commissioner is appointed to execute the decree for mandatory injunction, the Commissioner shall locate the portion of the land, which is convenient to both parties if a channel is formed and that there will be no order as to costs.

2. Tracing the history of the above Second Appeal coming to

be preferred by the defendant in the suit, it comes to be known that the plaintiff/respondent has filed the suit for declaration of the plaintiff's easementary right and enjoyment over the K.R.P.Dam water channel, for mandatory injunction directing the defendant to remove the obstruction in the channel and for recovery of Rs.1,000/- per year from the defendant towards damages caused to the crops till the date of opening the channel and enforcement of the plaintiff's easementary right, on averments such as that the plaintiff purchased the suit 'A' schedule property from one Raman alias Ramasami and his sons Ramasami and Govindasami under a sale deed dated 25.9.1975 that the plaintiff got the 'B' schedule property under a sale deed dated 5.9.1989 for a sale consideration of Rs.7000/-; that she joined the said two pieces of land into one and enjoying the same ever since the date of construction of K.R.P. Dam water channel and got right to take water through it; that she is also paying charges for water; that the channel from the K.R.P dam is running from west to east; that the plaintiff and defendant have obtained sale from one and the same person and both of them have got right in the channel; that the channel is 120.2 feet breadth; that since the defendant failed in his attempt to obtain sale from the plaintiff, he obstructed and caused damage to the crops when the plaintiff cultivated rice in Vaikasi 1989; that the plaintiff is entitled to Rs.1,000/- per year towards the value of damages; that the plaintiff has got easementary right over the water channel and she is enjoying the same for the last 20 years; that the plaintiff sent a reply dated 6.2.1990 to the notice dated 18.12.1989 issued by the defendant; and hence the suit for declaration of her easementary right and enjoyment over the K.R.P.Dam water channel, for mandatory injunction directing the defendant to remove the obstruction in the channel and to direct the defendant to pay a sum of Rs.1,000/- per year to the plaintiff as damages caused to the crops till the date of opening the channel, and enforcement of the plaintiff's easementary right.

3. On the contrary, the defendant in his written statement would state that the suit property belongs to the plaintiff and the defendant has not claimed any right over the same; that the land of the defendant is adjacent to the suit property, that the K.R.P dam water channel is not running through the land of the defendant; that no right of water was given under the sale deeds; that the channel in the suit property running from west to east is not separately going through the defendant's land; that if the channel was 120.2 feet breadth, the defendant has no intention to purchase the suit property; that there was no incident happened in the month of Vaikasi 1989; that it is false averment that there was a loss caused to the tune of Rs.1,000/- per year; that it is also false to say that the plaintiff has got easementary right over the K.R.P dam water channel for the past 20 years; that therefore, the plaintiff is not entitled to the reliefs of declaration of her easementary right over the channel, mandatory injunction and for compensation. On such averments, the defendant would pray to dismiss the suit with costs.

4. On such pleading by parties, the lower court would frame the following issues for determination of the questions involved in the suit, viz., (i) Whether the plaintiff is entitled to the relief of declaration? (ii) Whether the plaintiff is entitled to the relief of mandatory injunction? (iii) Whether the plaintiff is entitled to get damages as claimed? and (iv)

What relief, if any, the plaintiff is entitled to?

5. Second Appeal No.1456 of 1999 is preferred against the judgment and decree dated 31.3.1999 made in A.S.No.89 of 1998 by the Court of III Additional District Judge, Dharmapuri at Krishnagiri, thereby allowing the appeal without costs seting aside the judgment and decree dated 31.7.1998 made in O.S.No.51 of 1991 by the Court of District Munsif, Krishnagiri.

6. Tracing the history of the above Second Appeal coming to be preferred by the plaintiff in the suit, it comes to be known that the plaintiff/appellant has filed the suit for declaration and permanent injunction restraining the defendants or their men from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and for costs, on averments such as that the plaintiff has got title to the suit property by means of purchase from various persons under various sale deeds dated 26.6.1985, 7.10.1985, 8.6.1987, 25.1.1988 and 13.7.1989 and from then onwards, the plaintiff is in possession and enjoyment of the same; that patta was also issued to him and he has got receipt for payment of kist; that the K.R.P dam water channel is running near the plaintiff's land; that the plaintiff has got right to take water from the channel and is enjoying the same ever since the date of purchase; that the defendants are the adjacent land owners; that there was a competition between the plaintiff and the defendants in getting the sale of the suit property and its surrounding land; that even though the plaintiff and defendants are relatives, the defendants obstructed the water channel going to the plaintiff's land and the plaintiff has set right the same; that since the plaintiff apprehends that the defendants may again cause trouble, the plaintiff filed the suit for declaration of his right over the water channel running to the plaintiff's land and his right of passage and also for permanent injunction.

7. On the contrary, the defendants in their written statement would state that the defendants never obstructed the water channel running to the suit property and is taking water till date; that with a view to compete the suit O.S.No.142/90 filed by the defendants, this suit has been filed; that no cause of action arose for the suit. On such averments, the defendants would pray to dismiss the suit with costs.

8. On such pleading by parties,the lower court having framed the following issues for determination of the questions involved in the suit, viz., (i) Whether the plaintiff is entitled to the relief of declaration of easementary right over the K.R.P dam water channel running through the suit property and right of passage as prayed for? (ii) Whether the plaintiff is entitled to the relief of permanent injunction? and (iii) What relief, if any, the plaintiff is entitled to?

9. Since the subject matter of both the suits and the parties are one and the same, a joint trial was conducted and common evidence was recorded in O.S.No.51/91 for both the suits. The parties are referred to as they are arrayed in O.S.No.51/1991 i.e. the appellant herein as the plaintiff and the respondents as the defendants. During trial, the plaintiff, on his

side, would examine himself as P.W.1 and also would examine two other witnesses as P.Ws.2 and 3 for oral evidence and would mark 7 documents as Exs.A.1 to A.7 in support of his case, for documentary evidence. On the part of the defendants, in all, four witnesses are examined as D.Ws.1 to 4 for oral evidence and five documents would be marked as Exs.B.1 to B.5 in support of their case. The Court documents, Commissioner's report and plan are marked as Exs. C1 and C2.

10. Learned District Munsif, Krishnagiri having traced the facts and circumstances of the case as pleaded by parties, having framed the issues brought forth above and having appreciated the same in evidence issue-wise, had decreed the suit in O.S.No.51/91 filed by the appellant herein without costs and dismissed the suit in O.S.142/90 filed by the respondents herein without costs. Aggrieved by the said common judgment, the respondents herein have preferred appeals in A.S.Nos.8 8 and 89 of 1998 before the Court of III Additional District Judge, Dharmapuri at Krishnagiri and the said court also tracing the facts as pleaded before the trial court and framing the points below in both the appeals, viz., (i) Whether the appellants/defendants are entitled to take water from the K.R.P dam water channel to their land through the land of the respondent/plaintiff by means of prescriptive easement or easement of necessity? (ii) Whether the appellants are entitled to the relief of mandatory injunction? (iii) Whether the respondent/plaintiff is entitled to the relief of declaration and permanent injunction? and (iv) Whether the judgments and decrees of the trial court are liable to be set aside?, and appreciating the oral and documentary evidence placed on record, allowed both the appeals without costs, thus decreeing the suit filed by the respondents herein and dismissing the suit filed by the appellant herein. It is also ordered that as and when the Commissioner is appointed to execute the decree for mandatory injunction granted in favour of the respondents herein, the Commissioner shall locate the portion of the land, which is convenient to both parties if a channel is formed.

11. It is only aggrieved against the said common judgment delivered by the first appellate Court, the defendant in O.S.No.142/90, who is the plaintiff in O.S.No.51 of 1991, has come forward to prefer both the above Second Appeals on certain grounds as brought forth in the grounds of Second Appeals and raising the following substantial question of law:-

"While the respondents recognize the right of the appellant and would come forward to declare that they have no objection in the appellant taking the right of the decree since, they are in no way affected by such of the rights exercised with regards to the suit property, is it legal or reasonable on the part of the appellant to lay stress on the obstruction caused to the respondents in the KRP dam channel from exercising their rights, since both are equally entitled to make use of the water that flows from the dam through the channel?"

12. During arguments, learned counsel appearing on behalf of the appellant would submit that the appellant herein has filed the suit in O.S.No.51 of 1991 seeking the relief of declaration and permanent injunction restraining the defendants or their men from interfering with the plaintiff's

peaceful possession and enjoyment of the suit property and for costs. Likewise, Peruma, the respondent herein, who is the first defendant in O.S.51 of 1991 has filed the suit in O.S.No.142 of 1990 seeking the relief of declaration of her easementary rights in the K.R.P. dam channel, the water of which, flowed through the land of the appellant herein, and also for a mandatory injunction to restore the channel to the dimension of 120 ft. x 2 ft. alleged to be existing in the appellant's property and for damages at the rate of Rs.1 ,000/= per annum till the channel is restored and for costs; that the property was originally belonging to one Raman @ Ramasamy and under five different sale deeds, viz., Exs.A.1 to A.5, the appellant purchased the suit property; that K.R.P. dam channel runs from West to East abutting the appellant's property; that it takes a diversion towards the South and runs from South to North.

13. Learned counsel would further argue that the case of the respondents herein is that they do not have any other source of irrigation; that the defence is that an alternative channel runs South to North and he has access to the said channel; that the trial court rightly dismissed the suit filed by the respondents herein in O.S.No.142 of 1 990; that the Court Commissioner remarked that there was no water in the channel throughout; that after a long delay, the trial court decided the matter. Learned counsel would exhort that the point of limitation has been pleaded that his vendor has perfected his title by means of Ex.A.1. At this juncture, learned counsel would cite the following decisions, viz., (i) (2001) 2 M.L.J. 314 (Kesavan V. Ranga Reddy), (ii) (2000) 1 M.L.J.431 (Periyanna Gounder V. Komarasami), (iii) (2002)2 M.L.J. 659 (Ponnaiyan V. Karuppakkal) and (iv) 2001(4) CTC 193 (Kolandaidsami Gounder,K. V. Manickam).

14. So far as the first judgment cited above is concerned, it is held therein:

"When once the alternate pathway is available, the plaintiff alone cannot claim the alleged pathway under easementary right. According to the plaintiff, not only himself but also other persons are using the pathway, but they were not made parties to the suit and the suit was also not filed in a representative capacity. Plaintiff also failed to establish that they were using the pathway for more than 20 years. Lower Court's decree dismissing the suit of the plaintiff cannot be interfered with."

So far as the second judgment cited above is concerned, it is held therein:

"The principles to be borne in mind with regard to the easementary right are well-settled. It is necessary that the plaintiff should establish his case as required by law before he can claim a right of easement over the land. Section 15 of the Easements Act provides that where a right of way has been peacefully and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption for twenty years, the right would be established. It is also necessary for the plaintiff to establish that he openly enjoyed this right and that he did so as of right."

So far as the third judgment cited above is concerned, it is held therein:

"An easement of necessity is an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property."

So far as the last judgment cited above is concerned, it is held therein: "An easement has been said to be a privilege which the owner of one tenement has a right to enjoy over the tenement of another. Easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such easement of necessity arises where normally both the dominant and servient tenements have been in common ownership so that the creation of an easement by implication of law, may be said to be the outcome of the former jointness of the two tenements. The disposition which causes a cessation of the common ownership that gives rise to the creation of easement, may be of either tenement or simultaneous disposition of both the tenements."

15. In reply, learned counsel appearing on behalf of the respondents would submit that admittedly 21 cents of land was belonging to one Raman @ Ramasamy and the respondents in both the second appeals have purchased 9 cents of land under two sale deeds, viz., Exs.B.1 and B.2 respectively dated 25.09.1975 and 5.9.1989; that the appellant in both the appeals had purchased 12 cents and the remaining under two different sale deeds, viz., Exs.A.2 and A.5 respectively dated 07.10.198 5 and 13.7.1989; that the lands are irrigated from Krishnagiri Reservoir Project; that it is also not in dispute that the channel is running from West to East ending at the lands of the appellant; that the respondents' lands are on the Southern side and the appellant's lands are on the Northern side, adjacent to the channel; that the case of the respondents is that the appellant was denying water to their lands on the South through a channel, which is running through the land of the appellant; that the case of the appellant is that there is a North-South channel and the respondents were taking water only from that channel, and therefore, the respondents are not entitled to take water from the channel running through the lands of the appellant; that if there is any alternative facility, the respondent cannot pray easement of necessity, since it is inconvenient to others.

16. Learned counsel would further submit that the appellate court judgment regarding this aspect is covered in para. No.22 of the judgment; that regarding the other appeal in S.A.No.1456 of 1999, the respondents have no objection in the appellant getting a decree, since they are in no way affected.

17. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that the properties covered in the suit schedule in both the suits were originally belonging to the same vendor and all those rights that the vendor exercised related to both properties, the appellant and the respondents would also become entitled to and in spite of both having

purchased the properties from the common owner, since they were not able to get along well with each other regarding sharing of the water from the KRP dam channel, both have filed suits against one another seeking almost the same main reliefs against each other that is for declaration and permanent injunction declaring that they are entitled to the respective suit properties and restraining each from in any manner interfering with the rights of other, as it comes to be seen in the prayers of each suit. The trial court has decreed the suit filed by the appellant and dismissed the other suit filed by the respondents and the first appellate court reversed the finding of the trial court in allowing both the appeals preferred by the appellant therein, as a result of which, the respondent therein has come forward to prefer both the above appeals and the same are stoutly denied by the respondents.

18. Though evidence has been sufficiently let in by both parties and appreciated by the trial court and the first appellate court in their own way, ultimately what comes to be seen is that the respondents, who are the defendants in O.S.No.51 of 1991 have openly come out reporting no objection for the appellant taking water in the manner provided for, but without obstructing the respondents or interfering with their rights in any manner.

19. On the other hand, it is the appellant, who seems to have put up some obstruction in the course of taking water to the lands of the respondents, as a result of which, the respondents have also come forward to file the suit in O.S.No.142 of 1990 for not only seeking declaration, but also mandatory injunction for removing the obstruction and further seeking damages and therefore, there is no much difficulty in solving the problem. Very serious disputes do not appear to be in existence between the appellant and the respondents.

20. The appellant and the respondents would become entitled to whatever rights that were enjoyed regarding the KRP dam water through the channel by the predecessor in title. The troubles have arisen only on account of some obstruction having been caused on the part of the appellant in the enjoyment of water by the respondents in exercise of their own right, as a result of which, both have come forward to file the suits against each other. However, the respondents, in spite of being the parties, who have suffered comparatively more, has been exercising patience and they have graciously come forward to say that they have no objection in the appellant drawing water from the channel, provided the appellant do not interfere with the rights of the respondents in taking their share of water in the very same manner from the channel from KRP dam.

21. In circumstances wherein in one and the same subject matter, cases in counter have been filed against each other, it is not always the case that one has to be decreed and the other dismissed, as it has been misconstrued on the part of the courts below, since they have been under the misconception that if one suit is decreed, the other suit should be dismissed and on the vice-versa and in matters of such nature, as it is in the cases in hand, it is not the situation that if the appellant is permitted to draw his share of water from the common channel, the respondents should go bereft of

water or forego their rights to take water and on the vice-versa. Instead, both could enjoy the water running from the common channel from the KRP dam, but because of some ill-will or hatred that arose among themselves due to the competition in purchasing the properties from their predecessor in title, the issue of taking water has been made the common ground in their respective suits and hence the suits in counter.

22. When the respondents have openly come out that they have no objection in the appellant drawing the water from the channel, the same attitude should have been exhibited by the appellant also in favour of the respondents in not interfering with their taking water in the channel as usual and since it seems that the appellant has placed some obstruction in order to prevent the respondents from exercising their right of taking water, it is desirable that the appellant should be directed to remove the obstruction caused thus facilitating the respondents to freely enjoy their own share of water from the channel, but without causing any hindrance or obstruction to the appellant, as it has been openly spelt out by them.

23. It is also further necessary to be told that the respondents are not, in any manner, entitled to get damages, since the attack is reciprocal in the cases in hand in filing the suit and prosecuting the same till this Court and since both parties have suffered at the hands of the other, for the damages that is sought for on the part of the respondents, they would not become entitled and the Court has to so 'no' so far as this relief is concerned.

24. Further more, no strong case has been put up on either side. However, since each of the party is afraid of obstruction by the other from enjoying the suit properties in the usual manner, it has become necessary on the part of this Court to formally protect the interest of each against the other and there is no harm in passing the decree of declaration and permanent/mandatory injunction in both the suits. As regards the title of the respective suit properties in both the suits, there is no dispute among the rival claimants and it is only regarding the enjoyment of the water to the suit properties from the common channel that runs from KRP dam and when it has already been discussed and decided in the foregoing paragraphs that both are entitled to draw water without obstructing the chances of the other or creating any hindrance, each becomes entitled to be granted with permanent/mandatory injunction against the other and hence so far as the

reliefs of declaration and injunction sought for by both parties in both the suits are concerned, they are granted within the meaning of clarifications rendered in the following paragraphs.

25. So far as the suit in O.S.No.142 of 1990 is concerned, there shall be an order of mandatory injunction as against the defendant since it comes to be known that some obstruction has been caused by the defendant therein in the enjoyment of water from the channel by the plaintiff therein. Therefore, the appellant herein shall remove the obstruction caused so as to enable the respondents to enjoy water from the channel as the appellant is entitled to.

In result,

(a) Second Appeal No.1456 of 1999 is allowed;

(b) there shall be a decree in favour of the appellant in his suit in O.S.No.51 of 1991 for declaration and permanent injunction as prayed for and so far as these reliefs are concerned, the judgment and decree dated 31.3.1999 rendered in A.S.No.89 of 1998 by the Court of III Additional District Judge, Dharmapuri at Krishnagiri, is set aside, and the judgment and decree dated 31.7.1998 made in O.S.No.51 of 19 91 by the Court of District Munsif, Krishnagiri, is restored;

(c) Second Appeal No.1455 of 1999 is dismissed;

(d) there shall be a decree in favour of the respondents in their suit in O.S.No.142 of 1990 for declaration and mandatory injunction as prayed for and so far as these reliefs are concerned, the judgment and decree dated 31.3.1999 in A.S.NO.88 of 1998 by the Court of III Additional District Judge, Dharmapuri at Krishnagiri is confirmed, setting aside the judgment and decree dated 31.7.1988 made in O.S.No.142 of 1990 by the Court of District Munsif, Krishnagiri;

(e) however, it is made clear that the plaintiff in O.S.No.142 of 1990 is not entitled to the relief of damages sought for at Rs.1,000/= per annum;

(f) no costs.

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Index:Yes.
Internet:Yes.

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